By R. Biddle

ON THE APPLICATION OF PAYMENTS.

No part of the law exhibits, perhaps, such painful uncertainty as that relating to the application of payments made to a creditor by one indebted on various accounts. The student may pause, and, after wearying himself over this confusion, turn, at length, in despair, to a more promising chapter. Not so the anxious practitioner, who, in his midnight examination, knows that the morning must find him prepared to assume, at least, an air of confidence. The judge, too, in the high responsibility of passing upon momentous interests, often seems driven, after turning over the books, to the *sortes virgilianæ*, and adopts the dictum on which his jaded vision may chance to rest. In a recent case before the Supreme Court of New-Jersey, (3 Green's Reports, p. 318,) it is said:

"The application of payments seems to be a subject about which it is difficult to find general principles in the books to guide our practice. The party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of its appropriation. If both are silent the law must decide. But what is the decision of the law, or of enlightened reason, seems not to be well settled. Sometimes the court seems to have gone on the principle of preferring the supposed wishes or interest of the party paying. And sometimes a similar preference has been given to the party receiving. At other times the interest of a third party has governed the decision. And the cases seem to rest more on their own particular facts, than upon any general principles."

There may be no great difficulty in accounting, to some extent, for a state of things so disreputable to the administration of justice. The doctrine on this subject is borrowed from the civil law, as much so as that of *Substitution* and *Subrogation*. How idle, indeed, to talk of the common law, in reference to points which are only suggested by the exigencies of a refined and very complex state of society! Now in England there is a

repugnance to the civil law. Sir William Jones, in his Law of Bailments, states it to be "in bad odour among Englishmen." In the learned note to 9 Cowen, p. 773, it is said:

"On the head of *appropriation*, or as continental writers would say *imputation* of payments, it is matter of curiosity as well as instruction to see how nearly English judges have followed Roman lawyers without acknowledging it. As it cannot be supposed they did so unwittingly, we must probably set down their silence to that inveterate hatred by which their nation has long been characterized towards the Civil Law."

There is, perhaps, as much of national vanity as of hatred in this matter. The "nolumus leges Angliæ mutari" is perpetually before the imagination. Judges have been known to rebuke counsel for talking about the *Conquest* of England; and, in truth, to him who thrills (and who does not?) with the apostrophe to that flag which has braved "*these thousand years!*" the battle and the breeze, it is exceedingly distasteful to recall the prosaic truths of History. Chief Justice Holt says, (12 Modern 482, Lane vs. Cotton:)

"This is the reason of the Civil Law in this case which, *though I am loth to quote*, yet, in as much as the laws of all nations are doubtless raised out of the ruins of the Civil Law, as all governments are sprung out of the ruins of the Roman Empire, it must be owned that the principles of our law are *borrowed from the Civil Law*, and, therefore, grounded upon the same reason in *many* things, &c."

We must allow, too, for a reasonable love of ease, and repugnance to labor in new and unfamiliar fields, on the part of those whose current and necessary duties are sufficiently arduous. This is assigned as the reason for not permitting the citation, in Westminster Hall, of any American case decided in our National or State Courts. The dignity of the bench, too, might suffer if the necessity were admitted of seeking materials for thought or illustration in quarters where the aid of a dictionary or of a tyro might be indispensable. An occasional dip even into the year books, or into Brooke's Abridgment, is not calculated to weaken this repugnance.

Dr. Strahan, in the preface to his translation of Domat, more than a century ago, remarks:

"The little regard which has, of late years, been shewn in this kingdom to the study of the Civil Law has been, in a great measure, owing to the want of a due knowledge of it, and to the being altogether unacquainted with the beauties and excellencies thereof, which are known only to a few gentlemen who have devoted themselves to that profession; others who are perfect strangers to that law, being under a false persuasion that it contains nothing but what is foreign to our laws and customs."

It was a subject of reproach against *Lord Mansfield* that he recognized the merits of the Civil Law. The charge is caught up by Junius, and urged with his usual bitterness of vituperation.

"You have made it your study to introduce to the court where you preside, maxims

of jurisprudence *unknown to Englishmen;* the Roman Code, *the Law of Nations, (!)* and the opinions of foreign civilians are your perpetual theme."

Whatever influence may be ascribed to any or all of the foregoing considerations, it is certain that we find the English courts, at an early period, snatching from the civil law these maxims: 1. The debtor has the right to say how the money paid by him shall be applied. 2. If the debtor omit to indicate his will, the right of application passes to the creditor. Having got a rule thus brief, and easily remembered, there is discoverable an anxiety, for a long time, to discard all further reference to the Civil Law; and even, as with the gipsies, to disfigure the stolen children, lest their parentage might be detected.

The notoriety given in that country, of late years, to all proceedings in the courts of justice, has afforded scope for the criticism of an enlightened public opinion. No one could fail to be struck with the flagrant injustice which must often attend the blind adoption of rules from a foreign code, without those modifications which had been found necessary, in that very code, to meet the emergencies of an advanced state of civilization and commerce. However convenient such a bed of Procrustes might be to the indolent or unskilful operator, the writhings of its victims could not fail to excite attention and sympathy.

Sir William Grant, in *Clayton's case*, (1 Merivale 604,) with the manliness of conscious strength, is not afraid or even "loth" to quote the Civil Law; and English judges have since sought shelter behind his authority. Thus in the case of Field vs Carr, (5 Bingham, p. 13: 15 English C. L. p. 349,) Chief Justice Best says: "the rule *settled by Sir William Grant*, "has received the sanction of every court in Westminster Hall;" and in the same case, Parke Justice, says: "the *rule in Clayton's case* has been "adopted by all the courts in Westminster Hall, and the only question is "whether the facts here come within it."

Thus the rule in Clayton's case, as settled by Sir William Grant, in 1817, would now be gravely announced by an English writer as part of the "common law," whose sanction is derived from indefinite antiquity! All this does infinite mischief. It shocks that love of truth which should ever be intense with those who take part in the sacred ministry of Justice. It deadens, too, that just enthusiasm which we all cherish for the Common Law, in points wherein its undeniable superiority over the Civil Law is sketched, with such happy discrimination, by Chancellor Kent, (Lecture xxiii.)

The remarks which follow do not aim at any thing beyond awakening the professional mind to the necessity for a more comprehensive survey of this whole subject than has yet been presented.

In referring to the Civil Law, it is proper to mention to those whose researches have not heretofore taken this direction, that the Digest prepared by Tribonian and his sixteen colleagues, under the order of Justinian, is very deficient in precision and methodical arrangement. The Emperor allowed ten years for its completion; but it was finished in three. Instead of presenting a rule in language of its own, it groups together passages from the writings (since in a great measure lost) of distinguished Lawyers. It has been computed, that of the 1800 pages of which the Digest is composed, 600 were taken from the writings of Ulpian, 300 from Paulus, 100 from Papinian, 90 from Julian, 78 from Scævola, 72 from Pomponius, 70 from Gaius, 41 from Modestinus, and so on to other civilians of less note, in diminished proportions. The student, therefore, who looks into the work, expecting to find the anxious precision of a skilfully drawn statute, is sadly disappointed, and will, oftentimes, be subjected to the necessity of deducing for himself, by a laborious process, the "result of the cases." It may be supposed to occupy such a place as would to us a Digest of American decisions, if the Reports of Cranch, and Wheaton, and Peters, and Johnson, and Dallas, and Binney, and Pickering, and Cowen, and Wendell, and the rest, should perish and leave no other vestige of their contents. With all its faults, Chancellor Kent describes it as

"The greatest repository of sound legal principles, applied to the private rights and business of mankind, that has ever appeared in any age or nation. Justinian has given it the venerable appellation of the temple of human justice. The excellent doctrines and the enlightened equity which pervaded the work, were derived from the ancient sages, who were generally men of distinguished patriotism, and sustained the most unblemished character, and had frequently been advanced to the highest offices in the administration of the government."

The Digest has been universally admired for its purity and vigor of style; Lord Mansfield remarking, "it is held to be so perfect and elegant that the Latin tongue might be retrieved from it, were all other Latin authors lost."

Sir Mathew Hale felt strong enough to disdain any flattery of English prejudices on this subject. According to Bishop Burnet, (Life of Sir M. Hale, p. 24) he frequently said, that the true grounds and reasons of law were so well delivered in the Digest, that a man could *never well understand Law as a science* without *first* resorting to the Roman Law for information, and he lamented that it was so little studied in England.

The following passages of the Digest, relate to the subject under consideration. (Corpus Juris Civilis Ed. Lips. 1735, p. 988, Elzevir Ed. 1663, Dig. p. 682.)

Dig. lib. XLVI. Tit. III.

De Solutionibus et Liberationibus.

I. Ulpianus lib. XLIII. ad Sabinum.

Quotiens quis debitor ex pluribus causis unum debitum solvit, est in arbitrio solventis dicere quod potius debitum voluerit solutum, et quod dixerit id erit solutum. Possumus enim certam legem dicere ei quod solvimus:

Quotiens vero non dicimus id quod solutum sit, in arbitrio est accipientis cui potius debito acceptum ferat.

Dummado in id constituat solutum in quod ipse, *si deberet* esset soluturus (quoque debito se exoneraturus esset si deberet) id est, in id debitum quod non est in controversia, ant in illud quod pro alio quis fidejusserat, aut cujus dies nondum venerat. æquissinum enim visum est *Creditorem ita agere* rem debitoris ut suam ageret. Permittitur, ergo, Creditor constituere in quod velit solutum dummodo sic constituamus ut in re sua constitueret; sed constituere in re præsenti, hoc est statim, atque solutum est.

II. Florentinus lib. VIII. Justitutionum.

Dum in re agenda hoc fiat, ut vel Creditori liberum sit non accipere, vel debitori non dare, si alio nomine exsolutum quis eorum velit.

III. Ulpianus lib. XLIII. ad Sabinum.

Cæterum postea non permittitur. Hæc res efficiet ut in duriorem causam semper videatur sibi debere accepto ferre; ita enim et in suo constitueret nomine. § I. Quod si forte a neutro dictum sit, in his quidem nominibus quæ diem, vel conditionem habuerunt, id videtur solutum cujus dies venit.

IV. Pomponius lib. XIII. ad Quintum Mucium.

Et magis quod meo nomine quam quod pro alio fidejussorio nomine debeo; et potius quod cum pœna quam quod sine pœna debetur; et potius quod satisdato quam quod sine satisdatione debeo.

Ulpianus lib. XLIII. ad Sabinum.

In his vero quæ presenti die debentur constat quotiens indistincte quid solvitur, in graviorem causam videri solutum. Si autem nulla prægravet (id est, si omnia nomina simila fuerint) in antiquiorem; gravior videtur quæ sub satisdatione videtur quam ea quæ pura est.

VII. Ulpianus lib. XLIII. ad Sabinum.

Si quid ex famosa causa, et non famosa, debeatur, id solutum videtur quod ex famosa causa debetur. Proinde si quid ex causa judicati, et non judicati, debetur, id putem solutum quod ex causa judicati, et ita Pomponius probat. Ergo si ex causa quæ inficiatione crescit, vel pœnali debetur, dicendum est id solutum videri quod pœnæ habet liberationem.

It will be seen that the doctrine here announced, is drawn principally from the works of *Ulpian*, whose text is broken up into four detached paragraphs, with a view to interpolate the confirmatory or more minute provisions found in the writings of other distinguished civilians. It would appear, then:

1. Where he who is indebted on various accounts makes a payment, he has a right to designate in what manner the payment shall be applied.

2. If the debtor omit to declare on what account he makes the payment, the creditor may make the application.

Thus far the Civil Law has been followed implicitly in England and in America. Let us now advert to the *Proviso* by which the Civil Law qualifies the right of a Creditor:

Provided that the Creditor shall so apply the payment as he would himself have directed the application *had he been the debtor;* thus, the payment shall *not* be applied to a disputed debt, nor to one for which the payer was only surety; nor to a debt not yet due. For it appears most consonant to equity, that the creditor should act in reference to the case of the debtor as he would act in his own case. It is permitted, therefore, to the creditor to make the application, subject, however, to the restriction that it be such as he would have directed in his own case had he been the debtor.

However the rule, as thus modified, may seem to be expressed quaintly or even in mockery of the creditor, yet it is certainly not an *impracticable* one. The present Chancellor of New-York remarks, in Stone vs. Seymour (15 Wendell 29,)

"The Roman Law proceeded upon the *erroneous principle* that where there was an indefinite payment the creditor was bound to act upon the *Golden Rule* of doing as he would be done by, if he was himself the debtor; and must, therefore, apply it in that way which would be most beneficial for the debtor. See 1 Domat. In adopting this principle the Roman lawgivers *overlooked the fact,* that where there were conflicting interests the Golden Rule applied to the debtor as well as the creditor; and that upon the same principle it would be the duty of the debtor to allow his creditor to apply the payment in the way that he might consider the most beneficial to himself."

Here is a mixing up of things quite distinct from each other. The maxim, thus commented on, of a code drawn from a remote period of Paganism, does not aspire to the character of the Golden Rule inculcated by our Saviour. It merely establishes that the construction shall be perseveringly favorable, in all cases, to the debtor class—a sentiment with us strongly implanted in the popular mind, and which may be traced, on so many occasions, in our legislation and jurisprudence. It carries out that priority in the right of application which all concede to the debtor in the first instance, and which should remain with him until renunciation. This tenderness towards the debtor, is strikingly visible in our own law, where the question is whether a conveyance shall be deemed a mortgage or a conditional sale. The strong *leaning* to protect the party who, in the relation of Debtor and Creditor, occupies the feebler position, often causes even the plain intent of the parties, as evidenced by writing, to be over-ruled. Although not *the* Golden Rule, yet its spirit is so much in consonance

with our religion, that we are startled at its disappearance in the transfer of principles from a Heathen to a Christian code. Justinian did not venture to discard it.

3. The Civil Law exacts of the *Creditor* as well as of the Debtor, an application *at the time of payment*, differing in this particular, as is alleged, from the "Law of England."

The rule that the first choice is with the Debtor and the second with the Creditor, has a seductive facility of application, and, doubtless, in several English cases, has been pushed to the extent of declaring that if the debtor omit, at the time of payment, to indicate the destination, the creditor may arbitrarily apply it at any after period, although he was equally silent at the time of receiving the money. Yet *why* should a creditor be thus permitted, at any distant time, or even the moment after the debtor's back is turned, eagerly to book his advantage and congratulate himself that the subject was not adverted to during the interview? The prior right of the debtor all concede. He omitted to exercise it at the time of payment. So did the creditor. They are alike in default. The subject is forgotten or tacitly postponed. Why, then, should their positions be reversed when it has, at length, attracted attention and become an object of solicitude? If the creditor had declared his purpose, or if, at any future period, he should do so, without objection, here would be, it is true, an assent of minds—a compact. But it is quite different to say that he can, *exparte*, make an application which he well knows the debtor, if his attention were awakened, would earnestly deprecate.

When must the application be made by the creditor, if not at the time of payment? The attempt to answer this question, by exploring the cases, is a humiliating task to those who would fain regard the law as a science, or as supplying a clear and fixed rule of civil conduct.

The learned President of the Court of Appeals of Virginia, (Pendleton,) thus states the rule in *Hill and Braxton vs. Southerland's Executors*, (1 Washington Reports, Virginia, p. 133.)

"Although if the debtor neglect to make the application at the time of payment, the election is then cast upon the creditor, yet is incumbent upon the latter, in such a case to make a *recent* application by entries in his books or papers, and not to keep parties and securities in suspense, changing their situation from time to time as his interest, governed by events, might dictate."

In 4 Cranch, p. 320, Mayor of Alexandria vs. Patten, the Judge of the Circuit Court had laid down the law at the trial as follows:

"If Mr. Patten, at the time of paying the money, did not direct to which account it should be applied, and if it was not understood by the parties at the time of payment on which account it was made, the *plaintiff* had a right *immediately* to make the application on which account he pleased; but such application must have been *recent* and before any alteration had taken place in the circumstances of Mr. Patten."

This doctrine was declared, in an opinion pronounced by Chief Justice Marshall, to be erroneous.

"*No principle is recollected,*" says he, "which obliges the creditor to make this election immediately. After having made it he is bound by it; but *until he makes it* he is free to credit either the bond or simple contract."

In the case of Kirkpatrick vs. U. S. (9 Wheaton, p. 724,) Judge Story in delivering the opinion of the Court, (over which Chief Justice Marshall then presided,) says:

"The general doctrine is that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it the creditor may make it; if both omit it the law will apply the payments according to its own notions of justice. It is certainly *too late* for *either* party to claim a right to make an application *after the controversy has arisen,* and a fortiori at the time of trial."

The rule thus laid down would seem to be not only arbitrary but very difficult of application. When shall a controversy be said to have arisen? The truth is, with regard to these payments, that neither party cares at the time to touch the subject of appropriation. Solicitude on the part of the debtor, would imply misgivings as to his ability to meet *all* his engagements; whilst stiffness on the part of the creditor would convey a like ungracious intimation. They separate with smiles and good wishes and an air of gentlemanly indifference as to the precise language of receipts. The creditor afterwards slyly makes an entry, against which *he knows* the debtor would indignantly protest. There is an ascertained diversity of interest between them. It is this very conflict which causes the entry to be made. What does it matter that there has been no previous squabble—no overt act of dissention? *That* results from the secrecy of the entry. The controversy has long been foreseen. It would break out if the debtor *knew* what the creditor was about; and to get a start in the race is the creditor's motive for concealment. If this rule were found in a statute, the courts would probably give it the construction, that the entry to be available must be made when it is apparently a matter of indifference, and prior to any collision of interests or wishes; in analogy to an act or expression constituting part of the *res gesta,* before any selfish or deceptive purpose can be supposed to have been formed. Thus viewed, it would be useless for practical purposes.

In Harker vs. Conrad, (12 S. & R. 305,) a case before the Supreme Court of Pennsylvania, the present Chief Justice, in delivering the opinion of the Court, says:

"Although as between the immediate parties the creditor has a right to appropriate where the debtor has failed to do so, yet this right must be exercised within, *at the furthest,* a *reasonable* time after the payment, and by the performance of some act which indicates an intention to appropriate. It is too late to attempt it at the trial."

The same language as to a *reasonable* time, is found in the opinion of the court in 2 Vermont R. 286, *Briggs* vs. *Williams*.

In 5 Peters, 168, *Backhouse and others vs. Patten and others*, Judge M'Lean, in delivering the opinion of the court, says:

"Whether the application must be made by the creditor at the time the money is received, or within a reasonable time afterwards, it can be of no importance in this case to inquire. There may be cases where, no indication having been given as to the application of the payment by the debtor or creditor, the law will make it. But it cannot be admitted that in such cases the payment will be uniformly applied to the extinguishment of a debt of the highest dignity. That there are authorities which favor such an application is true, *but they have been controverted by other adjudications*"!

In the case of Philpot vs. Jones, 2 Adolphus and Ellis, p. 41, (29 Eng. C. L. Reports, p. 25,) Denman, Chief Justice, says:

"The defendant made no appropriation of that payment; the plaintiff, therefore, might elect *at any time* to appropriate it to this part of his demand."

And so Taunton, Justice in the same case:

"The rule is, that if a debtor pays money on account, and does not *at the time* state how it is to be applied, the creditor may make the appropriation. Here the 17*l* was paid without any application to the particular items of the account. The plaintiff, then, might apply that payment to the items in question; and he was not bound to tell the defendant at the time that he made such application; he might make it *any time before the case came under the consideration of a jury*."

In *Smith* vs. *Wigler and Tunnicliffe*, 3 Moore and Scott, 175, (30 Eng. C. L. Reports, p. 286,) Chief Justice Tindal says:

"Then supposing the conduct of Tunnicliffe not to amount to an indication of intention so to appropriate the payments, has the plaintiff, who in the next place has the right, signified his intention to set the sums received by him against the latter part of the account exclusively. In the absence of appropriation by the debtor, the creditor MUST make the appropriation *at the time the money comes to his hands*."

Yet in *Mills* vs. *Fowkes*, 5 Bingham, 455, (35 English C. L. p. 178,) the same Chief Justice says:

"These cases shew clearly that the receiver has a right to appropriate if the payer omit to do so; and, in Simson vs. Ingham, that he may make the appropriation *at any time before action*. Best J. was the only judge who said that the appropriation must be made within a reasonable time."

Bosanquet J. in the same case, says:

"As the debtor made no appropriation, the creditor might appropriate the payment *at any time before the action commenced*."

Coltman J. says:

"Notwithstanding the doubt expressed by the Master of the Rolls in *Clayton's case*, the general current of authorities is the other way, establishing that where the debtor omits to make an appropriation, the creditor may appropriate the payment to the earlier debt. Whether he should do that *within a limited time* it is not necessary to decide here, because there has been no *unreasonable* delay. The more correct view, however, seems to be that the creditor is *not limited in point of time*."

The case of *Simson* vs. *Ingham*, 2 Barnwall & Cresswell, 65, (9 Eng. C. L. p. 29,) referred to in the preceding cases, goes the length of deciding that entries made by the creditor on his own books, marking the appropriation of the money, are not binding on him until communicated to the debtor, but are revocable and may be shifted at any time prior to such communication.

Bailey J. "It has been insisted that, at that period of time, they had no right to do so, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been *communicated to the opposite party*, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has *made a communication* on the subject of those entries to the opposite party. Until that time, he continues to have the option of applying the several payments as he thinks fit."

Holroyd J. "Now those entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books, shows only that the idea of so applying the payments had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect."

Best J. "I think that he [the creditor] has *a reasonable time* to decide to which account he will place a sum that has been paid him without any application of it by his debtor, and more than a reasonable time has not been taken by the plaintiffs. When once the creditor has made his election he is bound by it. For the reasons given by my brothers, I think no election was made until the account was rendered to the Huddersfield bankers."

We can hardly fail to note here the complete reversal, by Christian Judges, of that humane presumption in favor of the debtor which characterises the doctrine as found in the Heathen code from which it is derived. The debtor is sternly told that his time has gone by; he had not sufficient presence of mind, at the critical moment, to claim his advantage; yet the creditor may not only be guilty of the same default, but he may, up to the last moment, arbitrarily withdraw an application made by himself if he can thereby better accommodate his fluctuating views of self-interest. The only condition imposed upon him is that he shall keep his debtor in ignorance of what he is about!

What is the clue by which to escape from this labyrinth? Long after the substance of these remarks had been committed to paper, the writer has seen the conclusions attained by a very eminent judge which are not unlikely to find favor and to carry convicton. In the recent case of *Gass* vs. *Stinson*, (3 Summer's C. C. R. 110,) Judge Story holds this language:

"There is no doubt that the doctrine of the common law, as to the appropriation of indefinite payments, has generally been borrowed from the Roman law; and it

is *deeply to be regretted* that there has been *any* departure, in any of the authorities, from its true results. The Roman law is equally simple, convenient and reasonable upon this subject; and for most cases will furnish an easy and satisfactory solution." p. 110.

"Now the whole of this doctrine of the Roman law turns upon the intention of the debtor, either express, implied, or presumed; express, when he has directed the application of the payment, as in all cases he had a right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of payment without objection; presumed, when, in the absence of any such special appropriation, it is most for his benefit to apply it to a particular debt. And, notwithstanding there are contradictory and conflicting authorities on this subject in the English and American courts, I cannot but think, that the doctrine of the Roman law is, or, at least ought to be held, and may well be held, to be the true doctrine to govern our courts. There is a great weight of common law authority in its favor, and, in the conflict of judicial opinion, that rule may fairly be adopted, which is most rational, convenient, and consonant to the presumed intention of the parties. If the creditor has a right in any case to elect to what debt to appropriate an indefinite payment, it seems to me, that can be only when it is utterly indifferent to the debtor to which it is applied, and then, perhaps, his consent that the creditor may apply it as he pleases, may fairly be presumed. Mr. Justice Cowen, in his learned aud elaborate opinion, in Pattison vs. Hull, (9 Cowen R. 747; Id. 765 to 673,) has examined and criticised all the leading authorities; and manifestly leans in favor of adopting the doctrines of the Roman law throughout. I confess myself strongly inclined the same way; and shall yield only to authorities which I am bound to follow."—p. 111.

It is very certain that decisions giving to the creditor a sharp and peremptory right of application, offend, even with all the softening of the modern cases, a nice sense of justice. President Tucker, in *Donally* vs. *Wilson*, 5 Leigh's Virg. R. 335, adverting to some of these cases which had been pressed in argument, could not forbear to remark:

"Those cases, then (if we accede to their correctness) do not sustain the instruction here. For my own part, I think they have *strained* the doctrine of the creditor's right far beyond what is reasonable."

In Pennsylvania, the case of *Harker* vs. *Conrad*, 12 S. & R. 305, seems to establish that, in the application of indefinite payments, the interest of the creditor will never be looked to so long as there can be discovered any known or presumed interest on the part of the debtor.

In that case a lumber merchant had a claim against the owner of *two* houses for materials furnished in their construction. A general payment had been made on account. He delayed to file his *lien*, under the statute, until it had ceased to be operative except upon *one* of the houses, and that one in the hands of a purchaser. He sought, therefore, to apply the payment to the expired lien, and fix the whole of what remained due upon the house on which the lien still subsisted.

The inferior court found not the least difficulty in the case, but decided it, off-hand, on the short "common-law" rule:

"The payments mentioned in the fourth point, on the part of the defendants, were not applied by the defendants at the time of payment to any particular account. The plaintiffs might, therefore, apply the payments to which account they thought proper."

After despatching this point, another is taken up which it is said "deserves more attention."

Yet the reversal was on the very point which the court below thought so free from doubt.

"As the charge was right," says Gibson, J. "on all the points but one, it is unnecessary to make any other than that point the subject of particular remark. The jury were directed that under the circumstances of the case, the right to appropriate the payment made on 3 July, 1820, devolved on the plaintiff."

He then proceeds to lay down the rules which govern in such cases:

"The debtor has the right to make the application in the first instance, and failing to exercise it, the same right devolves on the creditor; but where neither has exercised it, the law nevertheless presumes, in ordinary cases, that the debtor *intended* to pay in the way which at the time was *most to his advantage.* Thus, if it were peculiarly the interest of the party to have the money received in extinguishment of a particular demand, *the law intends that he paid it in extinguishment of such demand,* and that the omission to declare his intention was accidental. Such intendment is reasonable and natural, and one which will, in most cases, accord with what was actually the fact: it is therefore equivalent to an exercise of the party's right by acts, or an express declaration of intention.

"Where, however, the interest of the debtor could not be promoted by any particular appropriation, there is no ground for a presumption of any intention on his part, and the law there raises a presumption, for the same reason, that the payment was actually *received,* in the way that was most to the advantage of the creditor. I think these principles, as furnishing general rules, may fairly be extracted from the cases. Then, according to this, if the controversy was between the original parties, it would admit of a doubt, whether the payment ought not to be considered, as having been made on the foot of the account for materials furnished to the houses in Fourth street, because, by having it so applied, the plaintiffs would secure their whole demand, without the expense and trouble of filing their lien against those houses, whilst Harker and Thorn would not have been benefitted by having it applied to either demand in particular."

Thus far the doctrine announced did not dispose of the case, because it could not be positively affirmed that the pecuniary interest of the payer was involved, whilst, on the other hand, the receiver had a deep stake in sustaining the decision of the court below. The learned judge, therefore, proceeds to exhibit, in strong relief, the *moral* interest of the payer, which he holds to be decisive. It was his *duty* to protect the individual who had bought from him. It shall be presumed, therefore, in the absence of proof, that he intended to do so. The court proceed:

"But the introduction of a purchaser without notice into the case, leads to an opposite result. He stands in superior equity to Harker and Thorn, who were *bound in conscience to protect the title* which they had conveyed to him, and who, there is, there-

fore, as much reason to *presume*, intended to make this payment for *his* benefit, as there would be to presume that they intended to apply it in the way most conducive to *their own* interests, if a particular application of it could have produced an equal benefit to themselves. The law ought to *presume*, and does presume *that every man is governed by the dictates of conscience*, and that he *will do* what honesty requires of him, *even though it be against his interest*. Such a presumption can prejudice no one, nor does it injure the plaintiffs here. They were bound by every consideration of equity, to perpetuate their lien on the houses in Fourth street, and thus, while they secured themselves, to cast the burden on those whose duty it was to bear it. Having failed to do so, the purchaser stands in superior equity also to them; and they must therefore bear a loss which arose entirely from their own neglect, and which it was their duty to prevent."

Although hardship on a purchaser is here referred to, it has no further legitimate bearing on the argument of the judge than as illustrating the *quo animo* of the payer—the appeal to his imputed good faith—by arraying the circumstances which *ought to have been* decisive with a just and honorable man.

Subsequently, when the same case came up again, (2 Rawle, 324,) Justice Huston, in delivering the opinion of the court, after citing 12 S. & R. says:

"I refer to that case for the general law as to what debt a payment made and not appropriated at the time shall be applied to; and adopt the principle there stated as applicable to this matter, but much more strongly to these facts."

A very recent case in the same court, *Dickinson College* vs. *Church*, (1 Watts & Sergeant 464,) seems to present a singular appearance. There, a lumber merchant, *Church*, had supplied materials to a contractor, *Myers*, engaged in several contracts for building, and, who, amongst the rest, had one with the Trustees of Dickinson College for erecting a grammar school. The contract with the Trustees bore date 6 April, 1837. The account between Church and Myers extended from 22 January, 1837, to 13 November, 1837. A payment on account had been made 26 June, 1837. How was this to be applied? The Trustees contended that it should go to discharge so much of what constituted a *lien* upon their building. The lumber merchant's interest was that it should be applied to the earlier items of the account, for which he had no other security than the personal liability of the contractor, who had probably become insolvent.

The judge, in the court below, when pressed for a rule of appropriation, *left it to the Jury* to say how the payment was to be applied. The Supreme Court "see nothing wrong," in this course, and call it "leaving the determination of *the fact* to the jury," when it is obvious that the jury were left to find out, as best they might, a *rule* of appropriation "*as* matter of fact." So the reporter, who was of counsel in the case, evidently understood. Indeed, no one, it is presumed, could have contended, even

in the inferior court, that the jury were *not* to decide how far the facts, as established by positive or presumptive evidence, brought the case within any given rule laid down by the judge. It is incredible, too, that the ruling of the court to *that* effect, should have been deemed worthy of being formally announced to the professional world. The case, as a precedent, can be viewed in no other light than as enabling a court to escape from its proper responsibility on this perplexing subject.

It is remarkbale that the case in 12 S. & R. was not referred to by court or counsel. Yet it would appear to furnish a ready solution. The Trustees paid to the contractor a round sum in full for every thing, including materials. It would be perfidy on his part to leave the building subject, in their hands, to a *lien* for the very materials he was bound to provide. To do so, would expose him to a suit on the part of the Trustees, involving a stain upon his reputation, and, also, full indemnity for the consequences of his bad faith. Equally, therefore, as an honest and a selfish man, he must be presumed to have felt it his interest to apply the payment so as to relieve the Trustees. The law, according to 12 S. & R. will presume that such was the payer's intention, although he was silent at the time of payment, and will not suffer such presumed intent to be over-ruled by the receiver who would apply it to the unsecured debt.

In 9 Watts 386, is the case of *Berghaus* vs. *Alter & Co.* George H. Berghaus was indebted to Alter & Co. for merchandise. The facts are not set forth with precision, but it may be gathered that the first articles were furnished 16th October, 1835, on a credit of six months, and the remainder at successive periods thereafter on a like credit.

On 4th February, 1836, *Henry C. Berghaus*, father of George, united with him in a joint and several promissory note to Alter & Co. for $2000, payable twelve months after date. The suit was brought on this note. Payments had been made by the younger Berghaus from November, 1836, to March, 1837. The last, of $1200, was conveyed in a letter dated 18th March, 1837, and would seem to have been accompanied with a request for the release of the father, as Alter & Co. on 29th March, 1837, acknowledging the receipt of the money, say:

"Under all existing circumstances, which it is needless to again mention, you certainly cannot expect us to give up the note of your father for $2000 when it was first given us as collateral, and is, in fact, the only security that we have for the whole or any part of our claim; and if you will for a moment reflect, you would not, certainly, again ask such a thing; and we consider it just, to at once frankly give you our ideas; and that is, we are justifiable in holding said note as a collateral, and, yet, at the same time have no hesitation in saying that our confidence in your honor and honesty, and our feelings of friendship towards you, are still unlimited and unimpaired."

In order to release the father it was indispensable that this payment of